



DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Part 371

[Docket No. FMCSA-2022-0134]

Definitions of Broker and Bona Fide Agents

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Notification of final regulatory guidance.

SUMMARY: FMCSA issues final guidance, in response to a mandate in the Infrastructure Investment and Jobs Act (IIJA) to inform the public and regulated entities about FMCSA's interpretation of the definitions of "broker" and "bona fide agents" as it relates to all brokers of transportation by motor vehicle. FMCSA previously published a notice seeking public comment on the IIJA provision on June 9, 2022, and issued interim guidance on November 16, 2022. Today's notice makes updates to November 2022 guidance in response to the public comments the Agency received.

DATES: This updated guidance is applicable on [INSERT DATE OF PUBLICATION IN FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Mr. Jeffrey Secrist, Registration, Licensing, and Insurance Division, Office of Registration, FMCSA, 1200 New Jersey Avenue SE, Washington, DC 20590-0001, (202) 385-2367, jeff.secris@dot.gov. If you have questions on viewing or submitting material to the docket, contact Dockets Operations, (202) 366-9826.

SUPPLEMENTARY INFORMATION:

I. Viewing Comments and Documents

Viewing Documents and Comments

To view documents related to this docket, go to <https://www.regulations.gov/docket/FMCSA-2022-0134/document> and choose the document to review. To view comments, visit the same website, then click “Browse All Comments.” If you do not have access to the internet, you may view the docket online by visiting Dockets Operations on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Dockets Operations.

Privacy Act

All comments the Agency received in response to the November 16, 2022, notice mentioned above were posted without change to <http://www.regulations.gov>. Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). DOT posts these comments, without edit, including any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at www.transportation.gov/privacy.

II. Background

On November 15, 2021, the President signed the IIJA into law (Pub. L. 117–58, 135 Stat. 429). Section 23021 of the IIJA¹ directed the Secretary (through FMCSA) to issue guidance, within one year of the date of enactment of the IIJA, clarifying the definitions of the terms “broker” and “bona fide agents” in 49 CFR 371.2. The guidance must take into consideration the extent to which technology has changed the nature of freight brokerage, the role of bona fide agents, and other aspects of the freight transportation industry. Additionally, when issuing the guidance, FMCSA must, at a minimum: (1) examine the role of a dispatch service in the

¹ The full text is available at congress.gov/117/plaws/publ58/PLAW-117publ58.pdf.

transportation industry; (2) examine the extent to which dispatch services could be considered brokers or bona fide agents; and (3) clarify the level of financial penalties for unauthorized brokerage activities under 49 U.S.C. 14916, applicable to a dispatch service.²

The notice and comment rulemaking procedures of the Administrative Procedure Act (APA) do not apply to interpretative rules and general statements of policy (commonly called “guidance”) (5 U.S.C. 553(b)(A)). Accordingly, the APA did not specifically require FMCSA to solicit public comment, and most of the other statutes and executive orders that would be applicable if the opportunity for prior notice and public comment was required similarly do not apply. Nevertheless, in order to ensure that the guidance provides clear, useful, and relevant information for stakeholders, FMCSA solicited stakeholder input via a Federal Register notice published on June 9, 2022. (87 FR 35593). FMCSA then issued a Federal Register notice containing interim guidance. (87 FR 68635, Nov. 16, 2022). As part of the Consolidated Appropriations Act, 2023 (Pub. L. 117-328 (Dec. 29, 2022)), Congress directed FMCSA to finalize the guidance by June 16, 2023.³

While the interim guidance was effective immediately upon publication, FMCSA sought additional public comment to determine whether the guidance should be updated before being finalized. FMCSA also invited commenters to speak at a listening session during the Mid America Trucking Show (MATS) on March 31, 2023, but none of the commenters at the MATS session addressed this guidance. (87 FR 14439, Mar. 8, 2023). FMCSA also reopened the comment period for written comments, which were due by April 6, 2023. (87 FR 14322, Mar. 8, 2023).

FMCSA now issues final guidance on the definitions of “broker” and “bona fide agent,” including guidance on the role and activities of entities referred to as “dispatch services” and the

² Due to a statutory omission, FMCSA is unable to assess civil penalties for violations of 49 U.S.C. 14916 and may pursue such penalties only through the Department of Justice in federal court. Congress has indicated interest in FMCSA’s statutory authority in a recent House Appropriations Committee Report.

³ See Division L Joint Explanatory Statement to the Consolidated Appropriations Act, 2023. STAFF OF H.R. COMM. ON APPROPRIATIONS, 117TH CONG. (Comm. Print 2023).

level of financial penalties for unauthorized brokerage services provided by such entities. This document does not have the force and effect of law and is not meant to bind the public in any way, and the document is intended only to provide information to the public regarding existing requirements under the law or agency policies.

Stakeholder Comments

FMCSA received 55 comments on the interim guidance, in addition to more than 80 comments received during the previous comment period, and the Agency appreciates the time and effort stakeholders took in submitting these comments. The commenters included individuals, trade associations, brokers, and dispatch services. While the Agency does not specifically reference all comments in this guidance, the Agency would like to assure stakeholders it has reviewed and considered all comments filed.

III. Compliance with IIJA

A. Technology

The IIJA required FMCSA to examine the impact of technological advances in the freight transportation industry. In the interim guidance, FMCSA recognized that freight brokerage has changed immeasurably due to technology, including moving from a phone-based system to one conducted mainly over the internet. (87 FR 68637). However, such changes do not impact the fundamental nature of brokerage, which involves arranging transportation for compensation, and hence do not have a significant impact on this guidance.

Commenters on the interim guidance generally agreed with FMCSA's position on the extent to which technology has changed the freight brokerage business and the impact of such changes. FMCSA does not believe there is any reason to revise its analysis for the final guidance.

B. Bona Fide Agents

The IIJA also required FMCSA to examine the role of bona fide agents in the freight transportation industry. Based upon previous stakeholder comments, FMCSA determined in the interim guidance that bona fide agents are generally considered to be individuals or entities that

solicit business for a motor carrier. (87 FR 68638). In the recent comments, several commenters indicated that this statement may have made the relationship between a motor carrier and a bona fide agent seem too casual, when in reality a bona fide agent has a formalized and ongoing relationship with a particular motor carrier.⁴ FMCSA agrees that the regulatory definition of “bona fide agent” does not contemplate a casual relationship, as it requires the bona fide agent to be part of the motor carrier’s normal operations and to perform duties as directed by the motor carrier pursuant to a preexisting agreement which provides for a continuing relationship. 49 CFR 371.2(b).

C. Other Aspects of the Freight Transportation Industry

Another topic the IIJA requires FMCSA to consider when issuing this guidance is “other aspects of the freight transportation industry.” Numerous drivers and motor carriers raised concerns about economic pressures negatively affecting the industry.⁵ A group of commenters also sought action regarding allegations of fraud, supply chain abuse, theft of cargo, double brokering, and misappropriation of funds occurring in the industry.⁶ In response, FMCSA notes that “double brokering” is not a term defined by statute or regulation, and commenters use the term to refer to several different activities. However, it appears most commenters concerned with double brokering are referring to ways in which some entities act as brokers without proper authority.

FMCSA also notes that approximately 24 comments received in this docket asked the Agency to take actions beyond the scope of the guidance required by the IIJA, specifically regarding issues of transparency and fairness in transactions between motor carriers and brokers.⁷

⁴ See comments of PES, American Trucking Associations Moving & Storage Conference (ATA M&SC) at 3 FN6, and joint submission from MoveRescue, Mayflower Transit, LLC, and United Van Lines, LLC (MM&U) at 6.

⁵ See comments of PES, Hans Witt, Kadence Logistics Dispatching, and multiple anonymous commenters.

⁶ See two comments from Henry Seaton, on behalf of multiple stakeholders.

⁷ On March 17, 2023, FMCSA granted petitions from the Owner-Operator Independent Drivers Association (OOIDA) and the Small Business in Transportation Coalition (SBTC) to initiate a rulemaking on issues of transparency in brokered transactions. These comments appear to be related to this future rulemaking, and do not

While the guidance contained in this notice is limited to the issues Congress required FMCSA to examine with the enactment of IIJA, FMCSA nevertheless recognizes that its guidance is operating in a broader context and has impacts beyond the immediate focus of this guidance. In today's notice, FMCSA has worked to avoid creating unintended consequences, in issuing its interpretation of its regulations and related matters. While the guidance may be relevant to stakeholder compliance with FMCSA's regulations, any changes to FMCSA's regulations, and consequently to a stakeholder's compliance responsibilities, would need to be made through a rulemaking proceeding.

IV. Final Guidance

The interim guidance concerned six main areas: 1) the definition of broker; 2) the definition of bona fide agent; 3) the role of dispatch services in the transportation industry; 4) how to determine whether a dispatch service is acting as a broker or as a bona fide agent; 5) services dispatchers may provide without broker authority; and 6) services for which dispatchers must obtain broker authority in order to provide. The guidance also clarified the level of financial penalties for unauthorized brokerage activities under 49 U.S.C. 14916.

FMCSA has considered the comments received and has made several updates to the guidance, discussed further below, and now issues final guidance on these topics.

A. Definition of Broker

Final Guidance: FMCSA has determined that the definition of "broker" at 49 CFR 371.2(a) is adequate. Handling money exchanged between shippers and motor carriers is one factor that strongly suggests the need for broker authority, but it is not an essential requirement for one to be considered a broker.

Discussion: As explained in the interim guidance, FMCSA is unable to change the statutory definition of "broker" at 49 USC 13102(2). (87 FR 68637). Nor is it able to change the

raise issues related to the guidance presented here. However, FMCSA will solicit public comment regarding transparency issues at the appropriate time.

regulatory definition of “broker” at 49 CFR 371.2(a) without going through the rulemaking process. However, FMCSA did clarify in the interim guidance that, although handling money exchanged between shippers and motor carriers strongly suggests the need for broker authority, it is only one factor of the analysis and is not, standing alone, determinative. (87 FR 68638).

Stakeholder reactions to FMCSA’s interim guidance were mainly supportive.⁸

Stakeholders asked FMCSA to clarify whether internet-based load matching services and load boards are considered brokers.⁹ While this topic garnered few comments, those that addressed it agreed that these services should not be considered brokers.¹⁰ However, some commenters expressed concerns about motor carriers, brokers, and dispatch services perpetrating fraud through the use of load boards.¹¹

In response, FMCSA has determined that merely making information about potential shippers publicly available, regardless of whether a fee is charged, does not require an entity to obtain broker authority as long as the entity making the leads available is not otherwise involved in any transaction between the shipper and a motor carrier.

B. Definition of Bona Fide Agent

Final Guidance: A bona fide agent may be either an employee of a motor carrier or a contractor but must perform its duties as specified in a preexisting agreement between the parties. While FMCSA has determined that the definition of “bona fide agent” in 49 CFR 371.2(b) is adequate, FMCSA clarifies that the term “allocating traffic,” which appears in the definition, means any exercise of discretion on an agent’s part when assigning a load to a motor carrier. If an entity representing more than one carrier exercises such discretion, it would not meet the definition of “bona fide agent.”

⁸ See, e.g., comments of SBTC at 1, ATA M&SC at 2-3 and ATA MS&C Supplemental Comment at 1, MM&U at 4-5, and Transportation Intermediaries Association (TIA) at 3.

⁹ See comments of ATA M&SC at 3.

¹⁰ See comments of ATA M&SC at 3 and ATA M&SC Supplemental Comment at 1; SBTC at 2.

¹¹ See comments of Hans Witt and Robert Bradley.

Discussion: The regulations define “bona fide” agents as “persons who are part of the normal organization of a motor carrier and perform duties under the carrier’s directions pursuant to a preexisting agreement which provides for a continuing relationship, precluding the exercise of discretion on the part of the agent in allocating traffic between the carrier and others.” 49 CFR 371.2(b). FMCSA cannot change this definition absent a rulemaking.

In the interim guidance, FMCSA determined that representing more than one motor carrier does not necessarily mean one is a broker rather than a bona fide agent. (87 FR 68638). Any determination will be highly fact specific and will entail determining whether the person or company is engaged in the allocation of traffic between motor carriers. Several commenters requested more clarity on the meaning of “allocation of traffic.”¹² FMCSA intended this term to mean any exercise of discretion, choice, or decision-making on the agent’s part about which motor carrier to assign a load.

If a bona fide agent represents only one motor carrier, it will assign all loads it sources to that particular carrier and thus, no exercise of discretion is necessary, and there is no dispute that the agent is not a broker. However, an agent representing multiple carriers should be careful to structure its agreements to avoid the possibility of allocating traffic. The scope of these agreements and the agent’s compliance with the terms of the agreements are key factors in the analysis of whether such an agent may qualify as a bona fide agent under the regulatory definition at 49 CFR 371.2(b). To illustrate, FMCSA presents two examples of situations where a bona fide agent may be able to represent multiple motor carriers without engaging in allocation of traffic.

The first example is where a bona fide agent represents motor carriers that require the agent to source loads originating in different geographic areas and selected motor carriers will not pick up freight in the other carriers’ locations. For instance, if the agreement between the bona fide agent and Carrier A requires the agent to source loads originating only in Maine, New

¹² See comments of SBTC at 2-5, ATA M&SC at 4, and an anonymous commenter.

Hampshire, Vermont, or Massachusetts, and its agreement with Carrier B requires it to source loads originating only in Florida, Georgia, or Alabama, the entity would not need to exercise discretion because all loads originating in a particular geographic location would necessarily be assigned to the relevant carrier.

A second example is if the bona fide agent has agreements with multiple carriers to source specific types of loads and these services do not overlap. For instance, if the agent's agreement with Carrier A requires the agent to source only hazardous materials loads, and the agreement with Carrier B requires it to exclude hazardous material loads, the agent would not have to exercise discretion as to which carrier to assign a load to, because the carriers are not willing or able to haul the same loads if sourced by the bona fide agent. Similarly, if Carrier A operates refrigerated trucks while Carrier B operates flatbed trucks, a bona fide agent may be able to represent both carriers without engaging in allocation of traffic.

However, if the agent's agreements require it to source the same type of loads for both carriers without geographic restrictions as described above, it could not represent both carriers without registering for broker authority, because any load assignments would necessarily require the entity to choose between carriers and would therefore constitute an allocation of traffic.

Several commenters operating in the household goods industry also asked FMCSA to clarify whether this guidance applies to "household goods agents," as that term is defined at 49 USC 13907 and 49 CFR 375.205.¹³ FMCSA initially determined it would address issues previously raised by the household goods industry in a separate proceeding. (87 FR 68638 at FN20). However, the stakeholders believe this would be unnecessary and asked FMCSA to address their concerns in this final guidance.¹⁴ FMCSA agrees with the stakeholders and, consequently, is issuing guidance here.

¹³ See comments of ATA M&SC at 3, MM&U at 6.

¹⁴ See comments of ATA M&SC at 3, MM&U at 6.

FMCSA recognizes that entities operating in the household goods transportation industry are subject to additional regulations. “Household goods broker” is defined in 49 CFR 371.103 as “a person, other than a motor carrier or an employee or bona fide agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation of household goods by motor carrier for compensation.” Moreover, 49 CFR 375.205 permits household goods motor carriers engaged in interstate transportation of household goods to have agents and provides that a “prime agent,” a type of household good agent, “does not include a household goods broker or freight forwarder.” Thus, to the extent a person or company is operating as a prime agent in the household goods sector, this guidance would not be applicable to such person or company.

C. Role of Dispatch Services

Final Guidance: There is no statutory or regulatory definition of a dispatch service, nor is there a commonly accepted definition of such a service. Some features of dispatch services include working exclusively for motor carriers, not for shippers; sourcing loads for motor carriers; and performing additional services for motor carriers that are unrelated to sourcing shipments. FMCSA does not have statutory authority to regulate dispatch services unless such entities also meet the criteria for registration as brokers, freight forwarders, and/or motor carriers.

Discussion: The IIJA required the agency to examine the role of dispatch services in the transportation industry and the extent to which such services could be considered brokers or bona fide agents. However, Congress did not define the term “dispatch service” in the IIJA provision mandating this guidance, and the comments FMCSA received prior to issuing the interim guidance made clear that there is no universally accepted definition of the term. Thus, FMCSA attempted to determine what constitutes a “dispatch service” by examining the role such entities play in the transportation industry and set out several common features of dispatch services in the interim guidance. (87 FR 68639).

TIA suggested that FMCSA should require all dispatch services to register with FMCSA, either as brokers or as a new class of licensed entity.¹⁵ Freight Girlz also asked FMCSA to develop and issue a certificate of compliance to “legitimate dispatch companies” and suggested numerous criteria for obtaining such a certificate.¹⁶ However, FMCSA cannot define a new class of operating authority in this guidance. The existing registration statutes do not authorize FMCSA to regulate any entity in the transportation industry other than motor carriers, brokers, and freight forwarders. If a dispatch service or other entity does not meet the criteria for inclusion in one of these categories, FMCSA is unable to require registration or otherwise regulate that entity.

Some commenters on the interim guidance indicated that dispatch services are more attuned than brokers are to a carrier’s needs and a specific driver’s preferences, location, and other data.¹⁷ However, relatively few comments specifically addressed this portion of the interim guidance, as most commenters were concerned with the issue of how to determine whether a dispatch service is acting as a broker or as a bona fide agent.

After reviewing the comments, FMCSA has determined that the interim guidance is appropriate and has not made any significant changes in the final guidance.

D. Dispatch Service: Broker or Bona Fide Agent

Final Guidance: Dispatch services may be classified as either brokers or bona fide agents, depending on the nature and scope of their activities. This requires a fact-specific analysis of whether the dispatch service’s activities meet the criteria set out in the statutory and regulatory definitions of “broker” or “bona fide agent.” While no single factor is paramount in assessing the business relationship between a dispatch service and a motor carrier, the extent of a motor carrier’s control is relevant because the greater control a carrier has over a dispatcher’s

¹⁵ See comment of TIA at 3.

¹⁶ See comment of Freight Girlz.

¹⁷ See comments of Project Freight, LLC, Michael White, OOIDA and several anonymous commenters.

actions, the less likely the dispatcher is to exercise independent discretion in sourcing and allocating loads and hence need broker authority.

Discussion: The IIJA mandated that FMCSA examine when a dispatch service could be considered a broker and when it could be considered a bona fide agent. Approximately 20 commenters addressed this topic, and many of these comments indicated continuing uncertainty about how to properly categorize dispatch services. In response, FMCSA provides additional clarification in the final guidance and has reorganized the factors in the following sections indicating either the ability to perform services without broker authority or the need to obtain broker authority.

FMCSA does not believe it is the intent of Congress to eliminate the use of dispatch services in the freight transportation industry. It is also clear, based on feedback from stakeholders, that both small and large motor carriers believe dispatch services play an important role in their operations. In particular, small motor carriers who cannot afford a fulltime employee may rely on dispatch services to perform various functions, including ensuring the motor carrier has a steady stream of shipments, while allowing the motor carrier to focus on its core business of transporting freight.

FMCSA clarifies that, to determine whether a dispatch service is a bona fide agent, one must analyze whether the services the dispatcher is providing fall within the definition of bona fide agent in 49 CFR 371.2(b). If a dispatch service arranges transportation on behalf of multiple motor carriers and engages in the allocation of traffic, pursuant to 49 CFR 371.2, it is not a bona fide agent and must obtain broker operating authority registration. Ultimately, this analysis requires careful consideration of the nature and scope of the relationship between the dispatch service and the motor carrier, the number and type of carriers the dispatch service represents, and the specific services the dispatcher performs.

FMCSA understands that dispatch services may not be able to operate a successful business if they only work for a single, small carrier. Thus, the Agency has attempted in this

guidance to describe the maximum flexibility permissible under applicable law. However, FMCSA also recognizes that some dispatch services currently operating without broker authority may determine, based on the guidance, that their activities require them to either reduce the number of carriers they represent or apply for broker authority.

To help dispatch services determine whether their activities require them to apply for broker authority or not, FMCSA provides additional guidance in the following sections regarding specific activities that dispatch services may engage in without obtaining broker authority, and those that require broker authority.

E. Factors Indicating Broker Authority is Not Required

Final Guidance: A dispatch service that meets the following criteria would generally be considered a bona fide agent and would not require broker authority. This list is not exclusive, and a dispatch service does not necessarily have to meet every listed factor, depending on its specific activities.

(1) The dispatch service has a written legal contractual relationship with a motor carrier that clearly reflects the motor carrier is appointing the dispatch service as a licensed agent for the motor carrier. This is often a long-term contractual relationship. The written legal contract should specify the insurance and liability responsibilities of the dispatch service and motor carrier.

(2) The dispatch service complies with all state licensing requirements, if applicable.

(3) The dispatch service goes through a broker to arrange for the transportation of shipments for the motor carrier and does not seek or solicit shippers for freight.

(4) The dispatch service does not provide billing or accept compensation from the broker, third-party logistics company, or factoring company, but instead receives compensation from the motor carrier(s) based on the pre-determined written legal contractual agreement.

(5) The dispatch service is not an intermediary or involved in the financial transaction between a broker and motor carrier.

(6) The dispatch service is an IRS 1099 recipient from the motor carrier, or a W2 employee of the motor carrier as specified in the legal written contract agreement.

(7) The dispatch service discloses that they are a dispatch service operating under an agreement with a specific motor carrier, and the shipment is arranged for that motor carrier only.

(8) The dispatch service does not subsequently assign or arrange for the load to be carried/moved by another motor carrier.

(9) A dispatch service does not provide their “services” for a motor carrier unless that motor carrier specifically appointed the dispatch service as their agent in accordance with the aforementioned requirements.

F. Factors Indicating Broker Authority Is Required

The following factors indicate the dispatch service should obtain broker authority. This list is not exclusive, and a dispatch service does not necessarily have to meet every listed factor, depending on its specific activities.

(1) The dispatch service interacts with or negotiates any shipment of freight directly with the shipper, or a representative of the shipper.

(2) The dispatch service accepts or takes compensation for a load from the broker or factoring company or is involved in any part of the monetary transaction between any of those entities.

(3) The dispatch service arranges for a shipment of freight for a motor carrier and there is no written legal contract with the motor carrier that meets Section IV.E.1 of the Guidance above.

(4) The dispatch service accepts a shipment without a truck/carrier, then attempts to find a truck/carrier to move the shipment.

(5) The dispatch service engages in allocation of traffic by accepting a shipment that could be transported by more than one carrier with which it has agreements and assigns it to one of those carriers.

(6) The dispatch service is a named party on the shipping contract.

(7) The dispatch service is soliciting to the open market of carriers for the purposes of transporting a freight shipment.

G. Financial Penalties

Finally, the IIJA required FMCSA to clarify the level of penalties for unauthorized brokerage applicable to dispatch services. In the interim guidance, FMCSA determined that this assessment is straightforward. If the dispatch service is deemed to be providing unauthorized brokerage services pursuant to 49 U.S.C. 14916, the service will be subject to applicable penalties. If no finding of unauthorized brokerage is made, it will not be subject to such penalties.

After reviewing the public comments, FMCSA has determined that the interim guidance is appropriate and adopts the same analysis in the final guidance.

Robin Hutcheson
Administrator